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THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RODNEY M. TOOTHACRE, Plaintiff, v. UNITED STATES OF AMERICA, THE INTERNAL REVENUE SERVICE Defendant.	))))))))))))	Case No. 07-cv-2289-DMS-WMC **UNITED STATES' REPLY TO OPPOSITION TO MOTION TO DISMISS**

The United States of America ("United States"), by and through its undersigned counsel, hereby submits this Reply to Plaintiff's Opposition to Motion to Dismiss, and it respectfully shows the following:

BACKGROUND

On December 6, 2008, Plaintiff filed a Complaint seeking damages pursuant to 26 U.S.C. §§ 7432 and 7433 in the amount of $100,000.00 plus fees and costs related to the Internal Revenue Service's ("IRS") filing of federal tax liens against Plaintiff for his outstanding employment tax liabilities for the fourth quarter of 1991 and the first quarter of 1992 and for outstanding income tax liabilities for the tax years 1993 and 1994. On February 28, 2008, the United States filed a Motion to Dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, respectively. On May 2, 2008, Plaintiff filed an Opposition to the Motion to Dismiss ("Plaintiff's Opposition"). A hearing on this matter is currently scheduled for May 16, 2008, at 1:30 p.m.

Plaintiff's Opposition contains allegations and arguments that addresses the merits of his claim. (Opp. 3–8.) However, because the United States' Motion to Dismiss is based on jurisdictional grounds only, the merits of Plaintiff's damages claims are irrelevant at this stage. In response to the United States' jurisdictional arguments contained in its Motion to Dismiss, Plaintiff's Opposition argues that: (1) he has exhausted his administrative remedies for his claims under 26 U.S.C. §§ 7432 and 7433; and (2) he has properly stated a claim for damages under 26 U.S.C. §§ 7432 and 7433. (Opp. 9–12.) For the reasons set forth below, and for the reasons previously articulated in the United States' Motion to Dismiss, Plaintiff's arguments are incorrect as a matter of law.

ARGUMENT

A. As a Matter of Law, Plaintiff Did Not Exhaust His Administrative Remedies for His Claims Under 26 U.S.C. § 7432 and 7433.

The Complaint asserts claims for damages under 26 U.S.C. § 7432 for failure to release a tax lien and under 26 U.S.C. § 7433 for unauthorized tax collection activities. (Compl. ¶¶ 1, 2, 6.) Plaintiff's Opposition asserts, for the first time, that because the IRS sent Plaintiff a written letter on November 7, 2007 denying his purported administrative claim for damages, he has exhausted his administrative remedies under 28 U.S.C. § 2675 in order to maintain his suit under §§ 7432 and 7433. (Opp. 9–10.) This is wrong as a matter of law.

Section 2675 requires a plaintiff to exhaust administrative remedies prior to bringing a claim under the Federal Torts Claim Act ("FTCA"). See 28 U.S.C. § 2675; Vacek v. U.S.

Postal Serv., 447 F.3d 1248, 1250 (9th Cir. 2006); Fishburn v. Brown, 125 F.3d 979, 982 (6th Cir. 1997). Specifically, under § 2675, an administrative claim must be "finally denied" by the federal agency prior to bringing suit against the United States in federal court. 28 U.S.C. § 2675. Plaintiff's Opposition argues that because the IRS denied his purported administrative claim on November 7, 2007, he has complied with § 2675 and has properly exhausted his administrative remedies. However, since the Complaint does not allege any claim under the FTCA, § 2675, as a matter of law, simply does not apply in this case. Cf. Fishburn, 125 F.3d at 982 (recognizing that "[a]ctions connected with the assessment or collection of taxes . . . are expressly excluded from the [FTCA]").

The appropriate requirements for exhausting administrative remedies for claims for damages under §§ 7432 and 7433 are contained in Treasury Regulations §§ 301.7432-1 and 301.7433-1. Plaintiff's "Notice of Intent to Sue the United States of America," which contained a reference to § 7432 only (Martinez Decl. Ex. L.), was deficient and did not satisfy the Treasury Regulations for the reasons set forth in the United States' Motion to Dismiss. Further, Plaintiff did not submit any administrative claim to the IRS for his claim under § 7433, nor does he allege that he did in his Opposition. Because the failure to comply with the regulations deprives a court of jurisdiction even where the IRS has received actual notice of the claim, Venen v. United States, 38 F.3d 100, 103 (3d Cir. 1994); Amwest Surety Ins. Co. v. United States, 28 F.3d 690, 696 (7th Cir.1994), this Court lacks subject matter jurisdiction over Plaintiff's claims for damages under §§ 7432 and 7433 and should dismiss them pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

B. Even if Plaintiff Had Exhausted His Administrative Remedies, Plaintiff's Claims for Damages under 26 U.S.C. §§ 7432 and 7433 Fail to State a Claim Upon Which Relief Can Be Granted.

Plaintiff's Opposition also asserts that the Complaint states proper claims under §§ 7432 and 7433 because it alleges that "the actions of the IRS interfered with an prevented funding of a pending escrow which cost plaintiff a lot of money." (Opp. 11–12.) As stated in the United States' Motion to Dismiss, despite this broad statement, the Complaint contains no allegations of how the actions of the IRS were the proximate cause of the damages suffered, or how the figure demanded, $100,000.00, was derived, as required by Treasury Regulations § 301.7432 and 301.7433.

Plaintiff's Opposition further asserts that Plaintiff is entitled to recover "damages for the inconvenience, emotional distress and loss of reputation occasioned by the IRS' illegal activities." (Opp. 11–12.) As noted in the United States' Motion to Dismiss, this is expressly prohibited by the Treasury Regulations unless a plaintiff can demonstrate that they resulted in actual pecuniary damages. Treas. Reg. §§ 301.7433-1(b)(1), 301-7433-1(c)(1) ("Injuries such as inconvenience, emotional distress and loss of reputation are compensable only to the extent that they result in actual pecuniary damages."). Plaintiff's Complaint, nor his Opposition, make no such allegation.

Accordingly, dismissal of Plaintiff's claim for damages under §§ 7432 and 7433 is appropriate pursuant to Fed. R. Civ. P. 12(b)(6) because it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the Complaint. See Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000); Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1101 (9th Cir. 1999).

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CONCLUSION

WHEREFORE, the United States respectfully requests that this Court dismiss Plaintiff's Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The United States also requests that this Court grant any other relief to which it may be entitled.

DATED this 5th day of May, 2008.

Respectfully submitted,

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